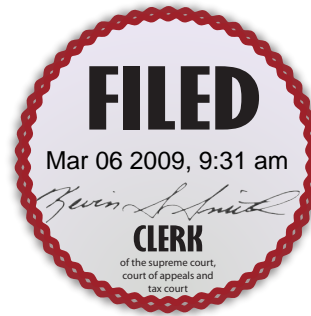


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD GLYNN STAKER,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 02A04-0810-PC-601

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0207-MR-4

March 6, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Donald Glynn Staker (Staker), appeals the post-conviction court's denial of his petition for post-conviction relief following his convictions for felony murder, Ind. Code § 35-42-1-1(2), and two counts of arson, one as a Class A felony and one as a Class B felony, Ind. Code § 35-43-1-1.

We affirm.

ISSUE

Staker presents a single issue for our review: whether the post-conviction court erred in ruling that his direct appeal counsel was not ineffective for failing to argue that Staker's convictions for both arson resulting in injury to a fireman, a Class A felony, and felony murder of his co-perpetrator violate principles of double jeopardy.

FACTS AND PROCEDURAL HISTORY

On July 7 or 8, 2002, Staker assisted Jacob Scott Bell (Bell) in setting a fire that destroyed a house owned by Bell's mother, Yvonne Kantor, and her ex-husband, Nick Kantor, in Fort Wayne, Indiana. Bell died in the fire, a fireman was injured, and a neighboring house incurred damage.

On July 18, 2002, the State filed an Information charging Staker with: Count I, arson, as a Class A felony, I.C. § 35-43-1-1, based on the burning of the Kantors' house and the death of Bell; Count II, arson, as a Class A felony, I.C. § 35-43-1-1, based on the burning of the Kantors' house and the injuries to the fireman; Count III, arson, as a Class B felony, I.C.

§ 35-43-1-1, based on the burning of the neighboring house; and Count IV, felony murder, I.C. § 35-42-1-1(2), based on Bell's death during the commission of the arson.

A jury trial was held on January 7-9, 2003. The jury found Staker guilty as charged on all four counts. The trial court entered judgment of conviction on Counts II-IV, but it did not enter judgment on Count I, arson resulting in the death of Bell, because of double jeopardy concerns. The trial court sentenced Staker to the presumptive term of thirty years on Count II, the presumptive term of ten years on Count III, and the presumptive term of fifty-years on Count IV. Finally, the trial court ordered the sentences on Counts II and III to run concurrently with each other but consecutive to Count IV, for a total executed sentence of eighty-five years.

Staker directly appealed to this court. His attorney raised three issues: sufficiency of the evidence, admission of evidence, and sentencing. On January 14, 2004, we issued a memorandum decision affirming Staker's convictions and sentence. *Staker v. State*, No. 02A04-0304-CR-171 (Ind. Ct. App. Jan. 14, 2004).

On April 26, 2005, Staker filed a *pro se* petition for post-conviction relief. On December 5, 2007, the State public defender's office filed an amended petition on Staker's behalf. The amended petition alleged that Staker's appellate counsel was ineffective for failing to argue in Staker's direct appeal that his convictions for both Count II, arson resulting in the injuries to the fireman, and Count IV, felony murder based on the death of Bell during the commission of the arson, violate the double jeopardy clause of the Indiana Constitution. On August 18, 2008, the post-conviction court issued Findings of Fact and

Conclusions of Law denying Staker's petition. However, the post-conviction court, on its own motion, vacated Staker's conviction and sentence for Count III, arson as a Class B felony based on the burning of the neighboring house, in light of "Double Jeopardy considerations[.]" (Appellant's Post-Conviction Relief App. p. 86).

Staker now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Staker contends that the post-conviction court erred in denying his petition for post-conviction relief. A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Williamson v. State*, 798 N.E.2d 450, 453 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*. A petitioner appealing from the denial of post-conviction relief stands in the position of one appealing a negative judgment. *Id.* As such, the petitioner must convince the court on appeal that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* We will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. *Id.*

Staker argues that he is entitled to relief because his attorney on direct appeal was ineffective for failing to argue that Staker's convictions for both Count II, arson resulting in injury to the fireman, and Count IV, felony murder of Bell, violate double jeopardy. Defendants are constitutionally entitled to the effective assistance of appellate counsel. *Id.*

Appellate ineffectiveness claims are evaluated under the *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *reh'g*

denied] standard of conduct falling below professional norms and resulting in prejudice such that confidence in the outcome is undermined. As for challenges to an appellate counsel's strategic decision to include or exclude issues, courts should be particularly deferential "unless such a decision was unquestionably unreasonable." To prevail on a claim of ineffective assistance of appellate counsel, a defendant must "show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. Appellate counsel is not deficient if the decision to present "some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Even if counsel's choice is not reasonable, to prevail, petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different.

Id. (quoting *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002), *reh'g denied*, *cert. denied*, 540 U.S. 830 (2003)). In addition to being significant and obvious, the issues not raised must be "clearly stronger than those presented." *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001), *cert. denied*, 535 U.S. 1019 (2002).

Staker asserts that his convictions for both arson resulting in injury to the fireman and felony murder of Bell violate the principle that "a conviction and sentence for both felony murder and the accompanying felony violates double jeopardy because the conviction for murder while in the commission of a felony could not occur without proof of the accompanying felony." *Kennedy v. State*, 674 N.E.2d 966, 967 (Ind. 1996). Staker assumes that the arson resulting in injury to the fireman was the felony "accompanying" the felony murder. That is not the case. The State charged Staker with the burning of the Kantors' house in Counts I and II (Class A felonies) and the burning of the neighboring house in Count III (Class B felony), but the charging information for felony murder did not specify

which arson represented the “accompanying” felony. As such, if Staker’s appellate counsel would have raised the “accompanying felony” principle stated above and we would have found a violation, we would have only vacated the lesser conviction, Count III, a Class B felony. Because the post-conviction court already did that, Staker cannot show any prejudice based on his appellate counsel’s performance.

Even assuming, *arguendo*, that the arson of the Kantors’ house resulting in injury to the fireman was the arson underlying Staker’s felony murder conviction, we cannot say that Staker’s appellate counsel was ineffective for failing to raise the double jeopardy argument urged by Staker. Staker relies on the double jeopardy clauses of both the Indiana and United States Constitutions. Two or more offenses are the “same offense” in violation of Article I, § 14 of the Indiana Constitution “if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.” *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). The federal double jeopardy test, enunciated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is similar to the statutory elements test under the Indiana Constitution. *Richardson*, 717 N.E.2d at 50 n.41. Staker argues that his convictions fail the Indiana statutory elements test and, for the same reason, the federal *Blockburger* test; he makes no argument under the Indiana “actual evidence” test.

Under the statutory elements test, the court must inspect the relevant statute and the charging instrument for each offense in order to determine those elements that must be

established in order to convict. *Richardson*, 717 N.E.2d at 50. Each offense must contain at least one element that is separate and distinct from the other offense so that the same evidence is not necessary to convict for both offenses. *Id.* at 52. If that is not the case, convictions for both violate double jeopardy.

Under the arson statute, I.C. § 35-43-1-1, and the charging information for Count II, arson resulting in injury to the fireman, the State had to prove that Staker, by means of fire or explosion, did knowingly or intentionally damage the dwelling of the Kantors, without the consent of the Kantors, or damage the property of any person under circumstances that endanger human life, and that Staker's actions resulted in bodily injury to the fireman. Under the felony murder statute, I.C. § 35-42-1-1(2), and the charging information for Count IV, felony murder, the State had to prove that Staker killed Bell while committing or attempting to commit arson. Clearly, each offense contains elements that are separate and distinct from the other: on Count II, the State had to prove injury to the fireman; on Count IV, the State had to prove that Bell was killed.

The Indiana Supreme Court confronted analogous circumstances in *Bald v. State*, 766 N.E.2d 1170 (Ind. 2002). Bald set fire to an apartment complex, killing three people and injuring a rescuer. Bald was convicted of three counts of felony murder and one count of Class A felony arson based on the injury to the rescuer. He appealed, arguing that the four convictions violated double jeopardy because they were all based on the same arson. Our supreme court rejected Bald's argument, explaining, "To find Bald guilty of class A felony arson, the jury was required to find [the rescuer] was injured as a result of arson. In finding

Bald guilty of each felony murder, the jury was required to find evidence of a separate victim's death." *Id.* at 1172. Because "each conviction required proof of at least one unique evidentiary fact," they did not violate double jeopardy. *Id.*

Staker maintains that his case is distinguishable from *Bald* because Bald restricted his argument to the actual evidence test, while Staker restricts his argument to the statutory elements test. However, in the situation before us, we find this to be a distinction without a difference. The ultimate conclusion in *Bald* was that there was no double jeopardy problem because "each conviction required proof of at least one unique evidentiary fact[.]" *Id.* In cases like this and *Bald*, that fact satisfies both the statutory elements test and the actual evidence test.

Bald was written just over a year before Staker's appellate counsel filed the brief in Staker's direct appeal. This means that, when Staker's appellate counsel was preparing his brief, he was faced with a recent Indiana Supreme Court case holding that there is no violation of double jeopardy where a defendant is convicted of *both* arson resulting in bodily injury to a rescuer *and* felony murder of another person in the commission of the same arson. As such, even if it could be said that a double jeopardy argument was significant and obvious in the sense that Staker had multiple convictions arising from the setting of one fire, the argument certainly was not clearly stronger than the issues Staker's attorney actually raised. *See Wrinkles*, 749 N.E.2d at 1203. Therefore, the post-conviction court was correct to hold that Staker's appellate counsel did not perform deficiently by failing to raise the argument. Moreover, in light of *Bald*, we would have rejected such an argument even if it had been

raised, so, for this reason too, Staker was not prejudiced by his appellate counsel's failure to raise it.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err in denying Staker's petition for post-conviction relief.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.